Eddie Ho Toon Ngee (as administrator of the estate of Ho Meng Quee, deceased) v Prince Flora (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–1276 OF 2009

LOW HOP BING MOHD HISHAMUDIN AND ZAHARAH IBRAHIM JJCA

17 MAY 2011

Contract — Agreement — Tenancy agreement — Option to purchase clause — Construction of — Whether plaintiff/purchaser exercised option to purchase property — Whether conditions of option to purchase clause complied with — Whether firm of solicitors to whom plaintiff paid 10% of purchase price of property were defendant's solicitors

Eddie Ho Toon Ngee ('the defendant'), in his capacity as administrator of the estate of Ho Meng Quee, deceased, entered into a tenancy agreement with Prince Flora (M) Sdn Bhd ('the plaintiff'). Under this tenancy agreement the defendant agreed to rent his land ('the property') to the plaintiff for a term of three years with an option to renew the tenancy for a further term of three years. The tenancy agreement also granted the plaintiff the option to purchase the tenanted property at the purchase price of RM14,000 per acre provided the option to purchase was exercised before the expiry of the tenancy period. This right to purchase was to be exercised by the plaintiff paying 10% of the purchase price of the property to either the defendant directly or to the defendant's solicitors. The plaintiff allegedly exercised its option to purchase the property by making a cheque payment of RM41,000, being 10% of the purchase price of the property, to a firm of solicitors ('the firm'), which had earlier prepared the tenancy agreement for both the plaintiff and the defendant. The defendant claimed that the plaintiff's cheque payment of RM41,000 to the firm was a payment made to the plaintiff's solicitors and not the defendant's solicitors. As such, the defendant disputed that the plaintiff had exercised its option to purchase the property as agreed. The plaintiff thus commenced an action against the defendant for specific performance of the option to purchase clause in the tenancy agreement. The defendant counterclaimed against the plaintiff for vacant possession of the tenanted property and for double rental during the period the plaintiff was occupying the land as it was beyond the tenancy period. The trial judge found that the firm was acting as solicitors for both parties ie for the defendant/vendor as well as for the plaintiff/purchaser because the firm had acted for both parties at the time of preparing the tenancy agreement. The trial judge thus allowed the plaintiff's claim against the defendant for the specific performance of the

option to purchase clause in the tenancy agreement. This was the defendant's appeal against that decision.

Held, allowing the appeal with costs:

(1) The finding of the trial judge was against the weight of the totality of the evidence adduced. The fact that the firm had acted for both parties at the time of preparing the tenancy agreement did not mean that it was still acting as solicitors for the defendant when it agreed to accept the payment of RM41,000 from the plaintiff. On the facts of the present case, there was no clear authorisation by the defendant for the firm to accept the cheque payment of RM41,000 from the plaintiff for the purpose of the option to purchase. As a matter of law, the firm could not be deemed or presumed to be the solicitors acting for the defendant at the time when the 10% deposit was made by the plaintiff to that firm. Further, the partner of the firm testified that his firm was only acting for the plaintiff when it received the cheque payment of RM41,000 from the plaintiff (see paras 18–19).

(2) The documentary evidence also confirmed that at all material times the defendant's solicitors were not the firm to which the plaintiff had made the cheque payment of RM41,000, but another legal firm. As such, this court set aside the order of the High Court and allowed the defendant's counterclaim as per the pleading (see paras 21–22).

[Bahasa Malaysia summary

Eddie Ho Toon Ngee ('defendan'), dalam kapasitinya sebagai pentadbir hartanah Ho Meng Quee, si mati, telah memeterai perjanjian penyewaan dengan Prince Flora (M) Sdn Bhd ('plaintif'). Di bawah perjanjian penyewaan defendan bersetuju untuk menyewa tanahnya ('harta tersebut') untuk tempoh tiga tahun bersama pilihan untuk memperbaharui penyewaan tersebut untuk tempoh lanjutan tiga tahun. Perjanjian penyewaan juga memberi plaintif pilihan untuk membeli harta yang disewakan pada harga belian RM14,000 seekar jika pilihan untuk membeli dilaksanakan sebelum tamat tempoh penyewaan tersebut. Hak untuk belian ini seharusnya dilaksanakan oleh plaintif dengan membayar 10% daripada harga belian harta tersebut sama ada kepada defendan secara langsung atau kepada peguam defendan. Plaintif telah melaksanakan pilihannya untuk membeli harta tersebut dengan membuat pembayaran cek sebanyak RM41,000, iaitu 10% daripada harga belian untuk harta tersebut, kepada firma guaman ('firma tersebut'), yang mana pada awalnya telah menyediakan perjanjian penyewaan kepada kedua-dua plaintif dan defendan. Defendan berhujah bahawa bayaran cek plaintif berjumlah RM41,000 kepada firma merupakan bayaran yang dibuat kepada peguam plaintif dan bukan kepada peguam defendan. Oleh itu, defendan mempertikaikan bahawa plaintif telah melaksanakan pilihannya untuk membeli harta seperti yang dipersetujui. Plaintif justeru memulakan tindakan

terhadap defendan untuk pelaksanaan spesifik bagi klausa pilihan untuk membeli di dalam perjanjian penyewaan tersebut. Defendan menuntut balas terhadap plaintif untuk milikan kosong harta yang disewakan dan untuk sewa berganda semasa tempoh plaintif menduduki tanah tersebut memandangkan ia menjangkaui tempoh penyewaan. Hakim bicara mendapati bahawa firma tersebut bertindak sebagai peguam untuk kedua-dua pihak iaitu untuk defendan/penjual dan juga untuk plaintif/pembeli oleh kerana firma tersebut telah bertindak untuk kedua-dua pihak semasa menyediakan perjanjian penyewaan. Hakim bicara justeru membenarkan tuntutan plaintif terhadap defendan untuk pelaksanaan spesifik bagi klausa pilihan untuk membeli di dalam perjanjian penyewaan tersebut. Ini merupakan rayuan defendan terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Dapatan hakim bicara adalah bertentangan dengan nilai keseluruhan keterangan yang dikemukakan. Fakta bahawa firma tersebut telah bertindak untuk kedua-dua pihak semasa menyediakan perjanjian penyewaan tidak bermaksud bahawa ia masih bertindak sebagai peguam untuk defendan semasa ia bersetuju untuk menerima bayaran sebanyak RM41,000 daripada plaintif. Berdasarkan fakta kes ini, tidak terdapat pemberian kuasa yang jelas oleh defendan untuk firma tersebut menerima bayaran cek RM41,000 daripada plaintif bagi tujuan pilihan untuk membeli. Dari segi undang-undang, firma tersebut tidak seharusnya dianggap sebagai peguam yang bertindak untuk defendan pada masa apabila deposit 10% telah dibuat oleh plaintif kepada firma tersebut. Selanjutnya, rakan kongsi firma tersebut telah memberi kenyataan bahawa firmanya hanya bertindak untuk plaintif apabila ia menerima bayaran cek RM41,000 daripada plaintif (lihat perenggan 18–19).

(2) Keterangan dokumentari juga mengesahkan bahawa pada kesemua masa matan, peguam defendan bukanlah firma yang mana plaintif telah membuat bayaran cek RM41,000 tetapi adalah firma perundangan yang lain. Oleh itu, mahkamah ini mengetepikan perintah Mahkamah Tinggi dan membenarkan tuntutan balas defendan seperti di dalam pliding (lihat perenggan 21–22).]

Notes:

For a case on tenancy agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2833.

Appeal from: Civil Suit No 22–87 of 1995 (High Court, Johor Bahru)

Wong Kim Fatt (Bernard George with him) (Tay Bernard & Cheong) for the appellant.

Ang Boon Heng (Koh Lian Kin with him) (HH Long & Co) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court of Johor Bahru of 15 June 2009.

[2] On 15 June 2009 the High Court of Johor Bahru had allowed the plaintiff's (who is now the respondent before us) claim against the defendant (who is now the appellant before us) for the specific performance of an option to purchase clause in a tenancy agreement.

[3] The appellant/defendant had appealed to this court (Court of Appeal) against that decision.

[4] We have unanimously allowed the appeal with costs. We now give our reasons.

[5] On 20 July 1988 the plaintiff company, at the time known as Tae Tse (M) Sdn Bhd, and the defendant, Eddie Ho Toon Ngee (the administrator of the estate of one Ho Meng Quee, deceased) entered into a tenancy agreement. By this tenancy agreement, the defendant lets out his land to the plaintiff for a term of three years, with an option to renew for a period of three years effective from 1 November 1991.

[6] The plaintiff company subsequently changed its name to Prince Flora (M) Sdn Bhd.

[7] The tenancy agreement also grants the tenant with another option; cl 4 of the tenancy agreement grants the respondent/plaintiff, the tenant, an option to purchase the tenanted property ('the land'). The clause states:

> The Landlord hereby grants unto the Tenant an option to purchase the Demised Land at the price of $14,000-00 per acre to be exercised within the period of the tenancy herein created and that should the purchase price be settled before the tenancy period herein created expires, there shall be a refund of the rentals for the unexpired period, such discount/refund of rentals paid shall be made pro rata basis and that such discount/refund shall be utilized towards part payment of the total purchase price.

[8] It is to be noted that the exercise of the option to purchase is subject to the following terms. First, the purchase price of the property is RM14,000 per acre. Second, the option to purchase must be exercised before the expiry of the tenancy period.

[9] The plaintiff was desirous of exercising the option to purchase. So, on 20 December 1989, with the intention of exercising the option to purchase, it made a payment by cheque of RM41,000 (being 10% and part payment of the purchase price) to a firm of solicitors, Messrs Lim, Han & Teoh, the firm of solicitors who had earlier prepared the tenancy agreement for both the landlord and the tenant.

[10] It does not appear to be disputed that that right to purchase may be exercised by the plaintiff by paying 10% of the purchase price either to the defendant (the vendor) directly or to the defendant's solicitors, as part payment.

[11] It is also not disputed that the deposit money of RM41,000 (the 10%) was never paid by the plaintiff *directly* to the defendant.

[12] It is, however, the contention of the plaintiff that the money was paid to Messrs Lim Han & Teoh *as solicitors for the defendant* (see para 6 of the statement of claim). Mr Lin Yu Tien ('PW1') the managing director of the plaintiff company testified to that effect:

> Deposit dibayar kepada peguam defendan iaitu Tetuan Lim, Han & Teoh.

[13] But PW1 does not explain the basis for saying that Messrs Lim, Han & Teoh was the defendant's solicitors for the purpose of the exercise of the option.

[14] The defendant, on the other hand, disputes this allegation. It is submitted by the defendant that when the payment of the RM41,000 was made to Messrs Lim Han & Teoh, it was made to that firm *as solicitors for the plaintiff* only. It is the contention of the defendant that at all material time he had his own solicitors, namely, Messrs Ho Thian Cheh & Co, and that Messrs Lim, Han & Teoh was aware of this fact.

[15] Whilst the plaintiff is claiming against the defendant for specific performance of the option to purchase clause, the defendant, on the other hand, is counterclaiming against the plaintiff for vacant possession of the tenanted property (the land) and for double rental for the period that the plaintiff is occupying the land beyond the tenancy period.

[16] Thus the crucial issue is this: was Messrs Lim, Han & Teoh acting as solicitors for the defendant at the time when the payment of RM41,000 was made by the plaintiff to that firm? The learned judicial commissioner, at the conclusion of the trial, made a finding (it would appear by way of inference) that the said firm, at the time of receiving the money, were acting as solicitors for both parties, meaning acting for the defendant (as the vendor) as well as for

the plaintiff (as the purchaser). Her reason for saying so is that Messrs Lim, Han & Teoh had acted for *both* parties at the time of preparing the tenancy agreement. In her judgment she said:

> 5 In *P19*, M/s Lim, Han & Teoh had clearly stated that they were the solicitors on record acting for both parties at the time of execution of the tenancy agreement. When no reply was forthcoming, a reminder was sent on 31 January 1990 (*P18*).

[17] The letter P19 that is referred to in the judgment reads:

> M/s. Ho Thian Cheh & Co.
>
> Advocates & Solicitors 4th
>
> Floor, OCBC Building Jalan
>
> Ibrahim Johor Bahru
>
> Dear Sirs,
>
> Re: Purchase of properties held under EMR 470, 471, 472 and 473 for Lot Nos. 363, 364, 365, 366 respectively, Mukim of Senai-Kulai
>
> We act for M/s. Princeflora (M) Sdn. Bhd. (formerly known as Tae Tse (M) Sdn. Bhd.) who are the intending purchasers of the above properties.
>
> We understand that you are acting for Mr. Eddie Ho Toon Ngee the sole surviving administrator of the estate of Ho Meng Quee (deceased).
>
> By a tenancy agreement dated 20th July, 1988 your client has granted an option in favour of our clients to purchase the above properties at RM$14,000/- per acre.
>
> Please be informed that our clients have exercised the option to purchase the above properties by paying to us (as solicitors on record acting for both parties at the time of execution of the said agreement dated 20th July, 1988) the sum of M$41,000/- being deposit and part-payment of the purchase price of the above properties.
>
> Kindly let us know whether you have any objection to us preparing the Sale and Purchase agreement which will be sent to you for your client's execution in due course.
>
> Your early reply is appreciated.
>
> Yours faithfully,
>
> …sgd…

[18] With respect, we are of the view that the finding of the learned judicial commissioner is against the weight of the totality of the evidence adduced before the court.

[19] In our judgment, after examining the evidence, it is our finding that

Messrs Lim, Han & Teoh, at the time when the payment of RM41,000 was made to them by the plaintiff/purchaser, were acting only as solicitors for the plaintiff/purchaser. It is, however, true that it is not disputed that Messrs Lim, Han & Teoh acted for both the landlord and the tenant in preparing the tenancy agreement in 1988 (it is to be recalled that the tenancy agreement was signed on 20 July 1988). But from this fact alone it cannot be inferred that Messrs Lim, Han & Teoh were still acting as solicitors for the defendant when they agreed to accept the payment of RM41,000 from the plaintiff/purchaser, unless there is clear authorisation by the defendant — and there is none in the present case — to them to accept the payment as the defendant's solicitors for the purpose of the option to purchase; and nor can Messrs Lim, Han & Teoh, as a matter of law, be deemed or presumed to be the solicitors acting for the defendant/vendor at the time when the 10% deposit was purportedly made by the plaintiff to that firm. Indeed, nowhere in the evidence of Mr Ah Kow @ Han Yek Yong (Mr Han — PW2), a partner of the firm Messrs Lim, Han & Teoh, who was called by the plaintiff as its witness, did he say that his firm was acting as solicitors for the defendant when his firm received the payment of RM41,000 from the plaintiff. Indeed, there is no evidence at all that the defendant had ever appointed Messrs Lim, Han & Teoh to act for him in the matter of the option or the sale and purchase of the tenanted property.

[20] On the other hand, we have the following evidence of Mr Han ('PW2') to the effect that, at the time of the payment of the RM41,000, his firm was only acting for the plaintiff and that the defendant had his own solicitors, Messrs Ho Thian Cheh:

> The exercise of the option, at this time defendant had his own solicitor Mr. Ho Thian Cheh.
>
> …
>
> If option was exercised by plaintiff, RM41,000 was not tendered to defendant. It was kept by us.
>
> …
>
> As solicitors acting for plaintiff, cheque forRM41,000 handed to me.

[21] The documentary evidence also confirmed that at all material times the defendant's solicitors were Messrs Ho Thian Cheh & Co. This can be seen from the letter of 20 December 1989 (exh P5) that Messrs Lim, Han & Teoh wrote to the plaintiff where, in the last paragraph of that letter, it is stated:

> We are presently liaising with the Vendor's solicitors, M/s Ho Thian Cheh & Co. on this matter and upon receipt of their reply we will revert to you.

[22] Accordingly, we set aside the order of the High Court, and we allowed

the appellant's/defendant's counterclaim against the plaintiff for delivery of vacant possession of the lands within three months from the date of our order, and for payment of double rental as per the pleading.

[23] We also made a further order that the caveat lodged by the plaintiff over the land be removed forthwith.

[24] There was a cross-appeal by the respondent but it was withdrawn and, accordingly, dismissed with no order as to costs.

[25] Appeal allowed with costs of RM15000.

Appeal allowed with costs.

Reported by Kohila Nesan